Supreme Court, U.S.
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In the

Supreme Court of the United States

JAMES J. HAYES, on behalf of himself and all others similarly situated, and THOMAS BOOTS, on behalf of himself and all others similarly situated,

Petitioners,

- v. -

CROWN CENTRAL LLC, MICHAEL F. DACEY, STANLEY A. HOFFBERGER, BARRY L. MILLER, FRANK B. ROSENBERG, HENRY A. ROSENBERG, JR., JOHN E. WHEELER, JR., JACK AFRICK, HAROLD RIDLEY, CREDIT SUISSE FIRST BOSTON CORPORATION and ROSEMORE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Should an attorney's negligence, which (i) does not prejudice the opposing party, (ii) does not cause any delay in the judicial proceedings and (iii) does not show any bad faith, be considered "excusable neglect" for purposes of extending the time to file a notice of appeal pursuant to FRAP 4(a)(5), as five circuits have held, or should an attorney's negligence never be considered excusable, as six circuits have held?

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PETITION FOR WRIT OF CERTIORARI

Petitioners James J. Hayes, on behalf of himself and all other similarly situated, and Thomas Boots, on behalf of himself and all others similarly situated, respectfully request that this Court grant their petition for writ of certiorari to review the judgment below of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished Order of the Court of Appeals dated June 28, 2005 denying the timely petition for rehearing en banc appears at page A-1 in the appendix to this petition ("Appendix"). The opinion of the Court of Appeals dated May 11, 2005 affirming the District Court is not published and appears at page A-4 in the Appendix. The unpublished Order of the District Court dated May 25, 2004 adopted by the Court of Appeals as its opinion appears at page A-6 of the Appendix.

JURISDICTION

The Court of Appeals entered judgment on May 11, 2005, and denied a timely petition for rehearing en banc on June 28, 2005. The Court of Appeals issued its mandate on July 6, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves Rule 4(a)(5) of the Rules of Appellate Procedure which provides as follows:

"(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) A party so moves no later than 30 days after the time prescribed by this Rule 4 expires; and

(ii) Regardless of whether its motion is filed before or during the 30 days after the time prescribed by

this Rule 4 expires, that party shows excusable neglect or good cause."

STATEMENT OF THE CASE

This case arises out of a "going private" or cash-out merger pursuant to which the public stockholders of Crown Central Petroleum Corporation ("Crown") were forced to surrender their common stock to Crown in exchange for $10.50 per share in cash. The petitioners are former stockholders of Crown who brought a class action on behalf of its public stockholders alleging that the respondents issued a proxy statement containing fairness opinions which were objectively and subjectively false in violation of § 14(a) of the Securities and Exchange Act of 1934 and Rule 14a-9 issued by the Securities and Exchange Commission, and breached fiduciary duties owed to public stockholders.

Subject matter jurisdiction existed in the District Court pursuant to 28 U.S.C. §§ 1331, 1337 and 1367 because the claims were brought pursuant to §§ 14(a) and 20(a) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78n(a) and 78t(a) and Rule 14a-9, 17 C.F.R. § 240.14a-9. Subject matter jurisdiction existed in the Court of Appeals pursuant to 28 U.S.C. § 1291 because it was an appeal from a final judgment that was entered on May 25, 2004, and the notice of appeal was filed on June 4, 2004.

On October 17, 2003, the Court of Appeals, in an unpublished per curiam opinion, vacated in part the judgment of the District Court for the Eastern District of Virginia at Alexandria, and remanded certain federal securities law claims of petitioners for consideration by the District Court. Hayes v. Crown Central Petroleum Corp., 78 Fed. Appx. 857 (4th Cir. 2003). After remand to the District Court, the respondents filed motions to dismiss such claims. A hearing was held on December 19, 2003 on the motions of the respondents to dismiss the claims which had been remanded to the District Court. At such hearing the District Court took the motions to dismiss under advisement after hearing oral argument by the parties.

By an order dated February 9, 2004 ("Order"), the District Court granted the motions to dismiss the claims, the Order was entered in the docket on February 12, 2004 and the case was closed on that date. The clerk of the District Court mailed a copy of the Order of February 9, 2004 to petitioners' local counsel, Timothy D. Battin, at the law firm of Straus & Boies, LLP, 10513 Braddock Road, Fairfax, Virginia 22032 in accordance with a local rule of the District Court providing that service of court orders would be made only on local counsel. The clerk of the District Court did not send a copy of the Order dated February 9, 2004 to lead, out-of-state counsel Edward Selfe in Birmingham, Alabama. Although Mr. Battin had instituted procedures to send all court orders or correspondence to Mr. Selfe immediately upon the receipt by Mr. Battin, due to an administrative mistake in the offices of Straus & Boies in Fairfax, Virginia, a copy of the Order of February 9, 2004 dismissing the case was not sent to lead counsel Edward Selfe in Birmingham, Alabama who handled all communications with the petitioners.

On March 30, 2004 Mr. Selfe discovered that the case had been dismissed by the Order dated February 9, 2004 and entered in the docket on February 12, 2004. Mr. Selfe immediately contacted the petitioners, and on April 5, 2004 petitioners filed a motion in the District Court for an extension of time to file a notice of appeal from the Order of February 9, 2004 dismissing the case. This motion was filed pursuant to Rule 4(a)(5) of the Rules of Appellate Procedure ("FRAP"). Pursuant to a May 15, 2002 scheduling order in this case in the District Court, the motions clerk of the District Court assigned the motion to Magistrate Judge Poretz as a non-dispositive matter for hearing on April 16, 2004.

At the hearing on April 16, 2004, after reviewing petitioners' memorandum and affidavit in support of their motion for extension, respondents' opposition to the motion for extension, and petitioners' reply, as well as receiving oral argument from both sides, the Magistrate Judge asked counsel for the respondents three questions:

> THE COURT: Let me just ask counsel a couple of questions.

Do you argue that there is a danger of prejudice to any of the Defendants if I grant the motion?

MS. EDWARDS: No, Your Honor. The prejudice in this case comes simply from not having finality, but that doesn't rise to the level of some independent prejudice, no.

THE COURT: Do you argue that the length of the delay and its potential impact on judicial proceedings is significant?

MS. EDWARDS: No, Your Honor.

THE COURT: Do you argue whether the filing o this motion was in good faith or not in good faith?

MS. EDWARDS: No, Your Honor.

An excerpt from the transcript of the April 16, 2004 hearing appears at p. A-9 of the Appendix. The Magistrate Judge found petitioners' reason was excusable, stating, "this series of events unfortunately happens in the practice of law," and therefore, "when I consider all the circumstances, I'm going to find under all the circumstances that it was excusable as it exists right here." *See* Appendix at p. A-10.

Respondents filed objections to the Magistrate Judge's order granting the extension of time to file a notice of appeal. The Chief Judge of the District Court performed a de novo review of the order of the Magistrate Judge granting the extension of time to file a notice of appeal. After reviewing memoranda of the parties and without a hearing, the Chief Judge vacated the Magistrate Judge's order and issued an Order dated May 25, 2004 denying petitioners' motion for an extension of time to file a notice of appeal. On June 4, 2004 petitioners filed a notice of appeal in the District Court from the Chief Judge's Order of May 25, 2004.

In an opinion dated May 11, 2005, the Court of Appeals concluded that the District Court had applied the correct standard of review of the Magistrate's order and that the District Court did not abuse its discretion in finding that petitioners failed to demonstrate excusable neglect warranting an extension of time to file the notice of appeal. The Court of Appeals affirmed the District Court for the reasons stated by the District Court in its Order dated May 25, 2004 which appears at page A-6 of the Appendix.

REASONS FOR GRANTING THE PETITION

Before this Court's ruling in Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380 (1993), the courts of appeals were divided on how to interpret the phrase "excusable neglect," which appears in many statutes and rules as a basis for relief from a filing a deadline. Some courts of appeals limited recognition of "excusable neglect" to cases in which the party seeking the extension was impeded by circumstances beyond its control. Other courts of appeals were willing to excuse delays in good faith and had not prejudiced the opposing parties or hampered the administration of the court. See Id. at 387 n. 3 (outlining the split).

In Pioneer, this Court repudiated the former, hard-line approach. "[T]he 'excusable neglect' standard," this Court held, "is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer." 507 U.S. at 391. The approach instead should be "an equitable one, taking account of all relevant circumstances surrounding the party's omission." Id. at 395. These circumstances include

(1) "the danger of prejudice to the debtor";

(2) "the length of the delay and its potential impact on judicial proceedings";

(3) "the reason for the delay, including whether it was within the reasonable control of the movant"; and